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No. 01-963

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et. al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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BRIEF *AMICI CURIAE* FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF THE RESPONDENTS

JONATHAN P. HIATT
815 Sixteenth Street, N.W.
Washington, D.C. 20006

ROBERT ALEXANDER
LEON DAYAN
LAURENCE GOLD *
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women, and the Academy of Rail Labor Attorneys, a professional association of attorneys who represent railroad employees in Federal Employers' Liability Act cases, file this *amici curiae* brief in support of Respondents with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

I. Under the common law, a plaintiff who pleads and proves that a defendant has negligently caused him to suffer a physical injury in the form of a disease (here, asbestosis) may recover, as an item of an overall damages claim, compensation for fear of contracting a future disease (here, cancer), so long as that fear is reasonable and is attributable to the same negligent act that caused the first disease. There is no further requirement that the fear be of such a nature as to generate a second physical injury, such as chronic nausea or the like. The Restatement (Second) of Torts, which distills the common law tort cases on this point, expressly so states, and it does so on the basis of common law precedents stretching back to at least the 1880's and continuing to the present. The Petitioner, while relying heavily in its argument on portions of the Second Restatement that state the elements that must be proven where the defendant's negligence has caused a purely emotional injury, quite simply ignores the section of the Restatement that directly applies to the situation here, where the negligence has caused a physical injury such as a disease, and that belies the Petitioner's position.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

II. Joint and several liability, which makes each of two persons whose tortious conduct is a cause of harm to another liable for the entire harm, has been applied in this country since at least the 1880's as the common law—and as the admiralty law—rule of liability for multiple tortfeasors causing a single indivisible physical injury, and is the rule of law stated in both the First and Second Restatements of Torts. Joint and several liability was the dominant rule of liability for indivisible harms throughout the twentieth century, and continues to be applied as federal common law in negligence frameworks similar to FELA. And, while the past three decades has seen changes of various kinds to the State laws of multiple tortfeasor liability, generally through legislative action, contrary to the Petitioner, these changes have not constitiuted a movement from the joint and several liability rule to the several liability rule that the Petitioner advocates for FELA.

ARGUMENT

Mindful that this Court has historically taken common law tort principles into account in resolving Federal Employers' Liability Act ("FELA") questions like the two questions presented in this case, the Petitioner Norfolk & Western Railway Company bottoms its arguments to this Court on an account of the common law tort principles that the Petitioner claims are relevant to, and should thus inform, the decision of this case.

In what follows we show: *first*, that the Petitioner's argument on the first question presented (which goes to the recovery of damages for fear of cancer in a personal injury negligence case), ignores the relevant common law rule and invokes an inapposite common law rule; and, *second*, that, the Petitioner's argument on the second question presented (which goes to the liability to a plaintiff of multiple negligent tortfeasors), fundamentally misstates the common law

liability rules at the time FELA was enacted and the nature of the evolution of these liability rules in recent years.[2]

I. THE DAMAGES ISSUE

A. To put the damages issue in its proper context, we begin by describing the cause of action the plaintiff-respondent railroad employees pleaded and proved and how and where the claim for fear-of-cancer damages entered the case.

The employees initiated this suit by pleading each of the familiar elements of a standard personal injury negligence cause of action. Those elements are "[1] duty . . .; [2] breach . . .; [3] causa[tion] . . . [and] [4] injury"—with the injury in a standard personal injury case being, of course, a physical injury. W. Prosser, *Prosser on Torts* §§ 30, 54 (4th ed. 1971). *See also Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 550-51 (1994) (noting that elements of "breach of duty, injury, and causation" must be satisfied to state a FELA negligence cause of action).

To prove those elements at trial, the employees introduced evidence to the effect [1] that the defendant-petitioner railroad owed a duty to conform to a reasonable standard of care to protect its employees from bodily harm; [2] that the defendant breached that duty by negligently exposing plaintiffs to harmful asbestos dust and fibers; and [3] that defendant's negligence was a cause of [4] a *physical injury* to the plaintiffs, in that each plaintiff was not merely exposed to asbestos, but contracted the disease of asbestosis and suffered the physical symptoms of that disease.[3]

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[2] In advancing its position, the Petitioner, of course, does not place its sole reliance on the arguments from the common law we discuss, but rather weaves those together with arguments from FELA and arguments from policy. The Respondents meet and rebut those arguments and we do not retrace the Respondents' steps in this brief.

[3] This Court has held that a slowly-progressing disease contracted by breathing in excessive amounts of harmful materials over a period of time

The employees also set out to prove, as one item of their *damages* claim—and *not* as the fourth element of their personal injury negligence cause of action—that a result of the defendant's tort was that the employees feared they would develop cancer.

For purposes of this Court's consideration of the issues presented on *certiorari*, the Petitioner accepts (albeit reluctantly) that the employees adduced sufficient evidence to sustain the jury's determination that they had made out all four elements of their personal injury negligence cause of action, including the physical injury element. Pet. Br. at 2. The issue here therefore is not—as it was in *Gottshall*, *Metro-North*, or *Urie*—whether plaintiffs have made out a FELA cause of action. That plaintiffs have done so is a given for the purposes of the proceedings in this Court. *See* Pet. Br. at i. Rather, the question is whether the jury should have been permitted to make a compensatory award for the employees' fear of cancer as one item of an overall damages award. The jury was instructed as follows:

> [A]ny plaintiff who has demonstrated a reasonable fear of cancer that is related to proven physical injury from asbestosis is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering. [J.A. 573].

The petitioner attacks this jury instruction, arguing that even where a defendant's negligence causes bodily harm sufficient to make out the "injury" element in a personal

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satisfies the "injury" element under FELA. *Urie v. Thompson*, 337 U.S. 163, 180 (1949) ("silicosis is an 'injury' within the meaning of that term" as used in FELA). *Accord* Restatement (Second) of Torts § 15 (1966) (hereinafter "*Rest. 2d of Torts*") ("illness" constitutes "bodily harm" under common-law tort principles). This Court has also held that where no such disease is contracted, the inhalation of harmful materials is *not* in itself a cognizable FELA injury. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997).

injury negligence cause of action, the plaintiff may *not*, as an item of the damages award for the tort, recover for fright, anxiety, apprehension, humiliation, fear, or other such emotions occasioned by the tort, but instead may *only* recover "pain and suffering" damages for "sensations stemming directly from a physical injury or condition." Pet. Br. at 15, 16.

Based on that premise, the Petitioner contends that in order for a plaintiff to recover for any emotional harms other than the painful sensations radiating from the injured or diseased body part—*viz.*, harms such as fear or anxiety over a potential future medical condition or over an early death—the plaintiff must plead and prove both a personal injury negligence cause of action *and* "the independent tort of negligent infliction of emotional distress." Pet. Br. at 10, 15-16. And, the Petitioner emphasizes that according to the Restatement (Second) of Torts, ("*Rest. 2d of Torts*") one of the elements of that independent tort is that the emotional distress be of such a nature as to generate "'substantial bodily harm' as a result of the emotional injury, such as 'long continued nausea' or 'repeated hysterical attacks,'" Pet. Br. at 17 (quoting *Rest. 2d of Torts* § 436A, cmt. c), and a second element is that the emotional distress must be the "immediate" result of the actor's negligent conduct and cannot follow from an intervening event such as learning of one's perilous condition from a physician. Pet. Br. at 21 (*citing Rest. 2d of Torts* § 436, cmt. c). From the foregoing, the Petitioner concludes that the jury instruction was defective in not requiring the plaintiffs to prove either element, and the jury verdict must on that account be reversed.

As we now show, the damages instruction given by the trial court here was entirely in accord with longstanding common law principles governing the award of damages in personal injury negligence actions.

B. 1. Although the Petitioner repeatedly invokes sections of the Second Restatement of Torts that are far afield, *see* Pet.

Br. at 16, 18, 21, the Petitioner assiduously avoids citing the section of the Restatement which is directly in point and provides as follows:

> **§ 456. Emotional Disturbance Resulting From an Actionable Injury or the Conduct Which Caused It.**
>
> If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is *also* subject to liability for
>
> (a) fright, shock, *or other emotional disturbance* resulting from the bodily injury *or from the conduct which causes it*, and
>
> (b) further bodily harm resulting from such emotional disturbance. [*Rest. 2d of Torts* § 456 (emphasis added)].

The comments to § 456 explain that "[w]here the tortious conduct in fact results in bodily harm, and makes the actor liable for it, a cause of action is independently established, and there is sufficient assurance that the resulting emotional disturbance is genuine and serious. There may be recovery for such emotional disturbance, *even though the emotional disturbance does not result in any further bodily harm.*" *Rest. 2d of Torts* § 456, cmt. c (emphasis added). And, the comments contrast this rule, applicable in personal injury negligence cases, with the rule applicable where the independent "negligent infliction of emotional distress" tort is being asserted and where the plaintiff therefore is contending that the damages stem *solely* from an emotional injury caused by the defendant:

> Where the tortious conduct does *not* result in bodily harm, there can ordinarily be *no* recovery for mere emotional disturbance which has no physical consequences. (See § 436A). [*Rest. 2d of Torts* § 456, cmt. b. (emphasis added)].

Equally to the point, the comments make clear that the kinds of "emotional disturbance" for which recovery can be

had as an element of damages in a personal injury case are *not* limited to the painful "sensations stemming directly from a physical injury," Pet. Br. at 15-16, but include as well emotions such as "worry" or "grief" over further physical conditions or consequences that might befall the plaintiff as a result of the negligent act. *Rest. 2d of Torts* § 456, cmt. d (stating that plaintiff may recover for "worry," "grief," or "humiliation," as an element of damages in a personal injury case). *See also Rest. 2d of Torts* § 905, illust. 6 ("A seriously wounds B, who fears that the wound will cause death. In addition to damages for the physical impairment of the body and pecuniary loss caused by the wound, B is entitled to compensatory damages for the fear of death"); *id.*, illust. 3 ("A negligently causes B to lose an ear. B is entitled to damages not only for the pain and suffering, but also for the humiliation caused by his appearance").

The comments to § 456 also make it clear that recoverable emotional harms in a personal injury negligence case are not limited to the immediate, reflexive feelings of shock or disturbance that may accompany the victim's first consciousness of an injury. *See Rest. 2d of Torts* § 456, cmt. d (recovery may be had for grief and worry over permanently impaired physical condition even where plaintiff "does not realize until a month after the injury" that condition will be permanent); *id.*, cmt. e (plaintiff may recover for "fright" before injury occurs).

In sum, the common law tort damages rule is that a plaintiff who has pleaded and proved that the defendant's negligent act has caused a physical injury and has caused the injury in a way that tort law has traditionally recognized as giving rise to liability, may recover, *as an item of damages*, compensation for any emotional harms stemming from the same negligent act—without having to prove that those emotional harms caused yet a second physical injury.

2. The rule stated in *Rest. 2d of Torts* § 456 is firmly rooted in the common law cases stretching back at least to the

1880's and continuing to the present. The "Reporter's Notes" to § 456 of the Restatement cites many of the pertinent cases, including those that pre-date the 1908 enactment of FELA, *see Rest. 2d of Torts* § 456, App., and many more cases are cited in the leading treatises on torts and damages. *See, e.g.*, D. Dobbs, *Remedies* § 8.1, at 548 (1971); *id.* 541 & n. 36; C. McCormick, *McCormick on Damages* § 88 (1935) (citing numerous negligence cases prior to and closely contemporaneous with the enactment of FELA for the proposition that a plaintiff may recover as an item of damages in a personal injury case for "reasonable apprehension over the effects of the injury upon his health," as well as for "fear of death").

a. Among the many early cases that form the basis for *Rest. 2d of Torts* § 456, the ones most pertinent here are those where the defendant's negligence caused a bodily injury to the plaintiff and also caused the plaintiff to fear a future illness or health condition, or an early death. An illustrative case in this line is *Halloran v. New England Tel. & Tel.*, 115 A. 143 (Vt. 1921), cited in the Reporter's note to Restatement § 456. In *Halloran*, the trial court admitted, over the defendant's objection, evidence that plaintiff, an accident victim, experienced anxiety after she learned from her physician that by reason of the physical injuries she suffered in the negligently-caused accident, she would be unable to undergo a planned operation that would have given her the opportunity to overcome a pre-existing and otherwise fatal "malignant disease of a private nature." 115 A. at 144. The Vermont Supreme Court affirmed the trial court, holding that where anxiety as to the state of one's future health results from a negligently-caused accident that also produces a physical injury in the plaintiff, such anxiety is a "proper element of recoverable damages." The court added:

> It is under this rule that fear of hydrophobia (*Godeau v. Blood*, 52 Vt. 251 [1880]), apprehension of insanity (*Walker v. Boston & Maine R.R.*, 71 N.H. 271, 51 A. 918 [1902]), dread of blood poisoning (*Butts v. National Exchange Bank*, 99 Mo. App. 168, 72 S. W. 1083 [1903]), fear of giving birth to a deformed child (*Prescott v. Robinson*, 74 N. H. 460, 69 A. 522 [1908]), dread of death from swallowing glass (*Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 [1905]), are admitted as proper elements of damage. It is to be observed that mere regret, disappointment, or vexation are not mental suffering within the meaning of the rule (*Bovee v. Danville*, 53 Vt. 183 [1880], but fear, worry and apprehension are typical sorts of it. *Egan v. Middlesex, etc., R. Co.* (D.C.) 212 F. 562 [1913]. [*Halloran*, 115 A. at 144 (emphasis added)].

As the above-quoted passage indicates, in 1921 there was already forty years of authority behind the proposition that fear and anxiety relating to a future condition—and not merely pain and suffering occasioned by the sensations emanating from an injured body part—constitute recoverable "elements of damages" in a personal injury case.

One recurring set of cases in which that proposition came into play were those involving persons injured by dog bites who then feared that they might one day contract hydrophobia (rabies) or lockjaw. In some of the dog bite cases, the plaintiff presented evidence that the dog was rabid, *see, e.g., Buck v. Brady*, 73 A. 277, 280-81 (Md. 1909), and in others, the plaintiff presented evidence to the effect that, because the dog was not available to be tested, there was a risk that the dog might have been rabid and that the plaintiff might contract rabies, *see, e.g., Godeau v. Blood*, 52 Vt. 251 (1880). In *both* types of dog bite case, the courts permitted the plaintiff to recover damages for his fear of rabies or lockjaw, even where there was no evidence to suggest—and no instruction to the jury that it must find—that the fear or

apprehension was of such a nature as to generate physical symptoms.[4]

Moreover, as the passage quoted *supra* at 8-9 from *Halloran* makes clear, the principle that fear is a proper element of damages was applied in a wide range of circumstances in the common law period preceding and closely contemporaneous with the enactment of FELA. *See, e.g.*, *Butts v. National Exchange Bank*, 72 S.W. 1083 (Mo. App. 1903) (fear of blood poisoning from injury caused when iron post pierced skin of plaintiff's foot); *Watson v. Augusta Brewing Co.*, 52 S.E. 152 (Ga. 1905) (damages awarded for reasonable fear of untimely death from ingestion of shards of glass); *Goebel v. Fleming*, 13 Tenn. App. 473 (1931) (damages properly awarded for fear of death while hospitalized for injury, even though by time of trial plaintiff's condition no longer potentially fatal).[5]

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[4] *See Godeau, supra*, 52 Vt. at 251, 254-55 (upholding instruction to jury that "because one who had received [a bite] by a dog, not known to be rabid, would sometimes after a considerable time die of hydrophobia," jury could award damages for "apprehension" and "anguish" over the possibility of contracting rabies); *Warner v. Chamberlin*, 30 A. 638 (Del. 1884) (fear of rabies proper item of damages); *Buck v. Brady*, *supra*, 73 A. at 279 (bitten plaintiff could recover for fear of rabies based solely on testimony that, after receiving bite, she feared contracting rabies); *Heintz v. Caldwell*, 9 Ohio C.D. 412 (1898) (reversible error *not* to allow plaintiff to testify she fears rabies and lockjaw after being bitten by defendant's dog); *Ayers v. Macoughtry*, 117 P. 1088 (Okla. 1911) (proper to instruct jury that "in determining such amount [of damages] you may take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results").

[5] Still another set of recurring negligence cases are those where a pregnant woman who, after suffering a bodily injury, fears she will miscarry (or give birth to an unhealthy baby), and who does not in fact miscarry but instead gives birth to a healthy baby. In those cases, the courts permit testimony regarding—and recovery as an item of damages for—the fear obtaining between the date of the tort and the birth of the healthy baby. *See, e.g.*, *Bowley v. Duca*, 120 A. 74 (N.H. 1923) (damages properly awarded for fear of miscarriage; baby was born healthy).

b. The more recent common law cases are to the same effect. In *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958), for example, a negligent x-ray treatment by a series of radiologists caused the plaintiff a physical injury—burning, blistering, and dermatitis—and she sought, as an element of damages, to recover for the fear of cancer she began to experience two years after the exposure, when a dermatologist to whom she was referred told her that the burn put her at risk. The fear took the form of "purely mental suffering arising from [the] information the plaintiff received from a doctor." *Id.* at 252. The New York Court of Appeals held that the fact that the plaintiff had received a bodily injury antecedent to her fear provided a sufficient "guarantee of genuineness" to distinguish the case from various negligent infliction of emotional distress cases where no injury was shown and no recovery permitted, and provided as well an assurance that that the class of plaintiffs able to recover for fear of cancer would not be unduly broad. *Id.*

In *Hayes v. New York Central Railroad Co.*, 311 F.2d 198 (2d Cir. 1962), the Second Circuit applied the same principle in a FELA case brought by a worker who suffered frostbite (but with no amputation) by reason of the railroad's negligence. The Second Circuit held that it was proper for the jury to award, as one component of the plaintiff's damages, a sum to compensate him for the "fear and anxiety which plaintiff experienced in knowing of the ever-present threat of amputation." *Id.* at 201. *See also Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Pa. 1951) (awarding damages for fear of cancer).

More recently still—and of most particular pertinence here—the court in *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. App. 1986), an asbestosis/fear-of-cancer case on all fours with this one, carefully traced the evolution of the

personal injury cases allowing damages for fear of contracting a disease, and held, in accordance with those cases, that where the plaintiff has suffered an independently actionable injury by reason of defendant's conduct, the plaintiff may recover both for the injury and for the fear of contracting a subsequent disease, with no need to show that the fear resulted in physiological manifestations. Anticipating this Court's decision in *Metro-North*, the court in *Eagle-Picher* held that mere asymptomatic exposure to asbestos dust does *not* constitute an independently actionable "injury." *Id.* at 529. But because the plaintiffs there were not merely exposed to asbestos fibers, but suffered from the diagnosed disease of asbestosis, the court upheld a jury verdict awarding plaintiffs damages for fear of cancer.[6]

3. Against all of this, the Petitioner's approach is to try to change the subject. The Petitioner devotes pages and pages of its brief to an effort to establish that the weight of authority in the common law cases is that in order to make out a claim for what it acknowledges to be "the independent tort of negligent infliction of emotional distress," Pet. Br. at 10, two requisites must be satisfied that plaintiffs did not satisfy here—(i) that the emotional distress be of such a nature as to generate "substantial bodily harm"; and (ii) that the emotional distress must be the "immediate" result of the traumatic effect of the actor's negligent conduct and cannot follow from an

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[6] Numerous cases are in accord with *Eagle-Picher* on this point. *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, 1990 U.S. Dist. Lexis 7424, slip op. at 4 (N.D. Ill. 1990); *Beeman v. Manville Corp.*, 496 N.W.2d 247, 251-53 (Iowa 1993). The only one to the contrary, *Jones v. CSX Transport*, 287 F.3d 1341, 1348 (11th Cir. 2002), does little more than assume that in a personal injury case, as in a negligent infliction of emotional distress case, the plaintiff must, to recover for emotional harm, prove that the emotional harm caused a physical injury. That assumption is belied by the Restatement and the authorities on which it rests.

intervening event such as learning of one's perilous condition from a physician. Pet. Br. at 17-31.

But the issue in dispute in this case is *not* whether the requisites posited by Petitioner *were* met—it is quite clear they were not—but rather whether those requisites had to *be* met, given that the plaintiffs here pleaded and presented this case as a *personal injury* negligence case, and *not* as a "negligent infliction of emotional distress" case.

As to that issue, Petitioner's entire argument runs for all of two paragraphs. *See* Pet. Br. at 15-16. In neither of those two paragraphs (nor anywhere else in its brief) does Petitioner so much as take note of the fact that § 456 of the Restatement of Torts—quoted in full at p. 6 *supra*—deals in terms with the issue actually presented here, and that it does so on the basis of a long line of common law decisions, including those cited in the Restatement itself.

Nor does Petitioner attempt to identify an alternative body of common law cases that belie either (i) the *Rest. 2d of Torts* § 456 rule that "[i]f the actor's negligent conduct has so caused any bodily harm [such as asbestosis] to another as to make him liable for it, the actor is also subject to liability for (a) fright, shock, or other emotional disturbance resulting from the bodily harm or the conduct which caused it," *Rest. 2d of Torts* § 456; (ii) the further explication of the rule in comment c to § 456 that where negligence causes actionable bodily harm and also results in emotional disturbance, "[t]here may be recovery for such emotional disturbance, *even though the emotional disturbance does not result in any further bodily harm*"; or (iii) comments d and e to § 456, which make clear that the types of "emotional disturbance" for which recovery may be had under the rule go well beyond sensations of pain or suffering radiating from the physical injury and extend to such emotional harms that persist after the injury ceases to be painful, such as "worry," "grief," and "humiliation," as well as to harms that can arise before

the injury is even felt, such as pre-injury "fright." *See supra* at 6-7 (emphasis added).

Instead, Petitioner attempts in the two paragraphs to derive its alternative rule by parsing the words of a brief prefatory passage from this Court's decision in *Gottshall*—a case in which all parties agreed that, because the only injuries caused by the negligence there were emotional injuries, the plaintiffs, to recover at all, had to prove the elements of a "negligent infliction of emotional distress" cause of action. *See Gottshall*, 512 U.S. at 537, 539, 541. The *Gottshall* passage invoked by Petitioner states:

> The term "negligent infliction of emotional distress" is largely self-explanatory, but a definitional point should be clarified at the outset. The injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury, apart from the tort law concepts of pain and suffering. Although pain and suffering technically are mental harms, these terms traditionally have been used to describe sensations stemming directly from a physical injury or condition. The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury. [512 U.S. at 544 (internal citations omitted)]

On the face of it, what the Court is saying is this: in negligent-infliction-of-emotional-distress cases in which, by definition, the tort itself has not produced a physical injury, the types of emotional harm for which the plaintiff seeks compensation are *ipso facto* different from the emotions of pain or suffering that a physical injury generally produces.

Yet Petitioner reads into the passage the negative implication that in physical injury negligence cases, *only* the emotional harms of pain and suffering that radiate from the injury and *not* emotional harms like fright and anxiety are

recoverable as items of damages. Even when the passage is read in isolation, that interpretation is unwarranted. But what makes the interpretation even more unsound is that it would impute to the Court an intent to write a restatement of the law of tort damages that is contrary to *Rest. 2d of Torts* § 456 and to the common law precedent on which § 456 rests—and an intent to do so in a case in which the Court had, just a few sentences before the quoted passage, strongly reaffirmed the proposition "common law principles are . . . entitled to great weight in our analysis" of FELA issues. 512 U.S. at 544. That is no way to read an opinion of this Court.

Without its argument that the *Gottshall* passage requires a personal injury plaintiff who seeks to recover for fright, anxiety, fear and related emotional harms to proceed, if at all, on a separate negligent-infliction-of-emotional distress cause of action, the Petitioner's argument collapses. For, as we have shown, in a personal injury negligence cause of action, there is no requirement that a second physical injury be proved, and it is no bar to recovery that the emotion experienced—here, fear of a future health condition—be an immediate, reflexive response to a trauma rather than a considered response to facts learned later, as from a physician. Indeed, learning of one's health risks from a physician, far from being a bar to recovery, provides an added guarantee that the fear is reasonable. *See Halloran, Ferrara.* The jury instruction here was thus entirely proper.[7]

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[7] As further support for its position, the Petitioner (joined on this point by the United States as *amicus curiae*) invokes this Court's decision in favor of the defendant in *Metro-North*, where the defendant's negligence caused *solely* an emotional injury to a "*disease and symptom free*" plaintiff. *Metro-North*, 521 U.S. at 432 (emphasis added). In particular, the Petitioner and the Government invoke the *Metro-North* Court's discussion of the policy arguments stated in the common-law decisions and the common-law materials, such as the Second Restatement of Torts, as to why a rule permitting recovery on such facts would "on balance cause more harm than good." *Id.* at 438. But the Petitioner and the

II. THE MULTIPLE TORTFEASOR LIABILITY ISSUE

The Petitioner supports its argument for a FELA "several" liability regime—in which damages liability is apportioned "by principles of comparative responsibility when a defendant is a legal cause of all or part of [a plaintiff's] injury that is indivisible by causation," Pet. Br. at 50—with the following common law points: *first*, at the time of FELA's enactment, "[s]everal liability was not only the general rule, but the overwhelming rule," and "[i]n contrast, joint liability [of multiple tortfeasors] was imposed only in limited circum-

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Government miss the essential point of *Metro-North*, which is that the Court should be faithful to the balance reflected in the *common law principles themselves*. *See Metro-North*, 521 U.S. at 436 ("We do not raise these [policy] questions to answer them (for we do not have the answers).").

Thus, the Petitioner and the Government commit an error that is the mirror image of the error made by the unsuccessful plaintiff in *Metro-North*. The plaintiff there "argue[d] that his evidence of exposure and enhanced mortality risk is as strong a proof as an accompanying physical symptom that his emotional distress is genuine." 521 U.S. at 436. But the Court, after acknowledging there was some force to this argument, responded that the argument

> overlooks the fact that the common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns. . . . The common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom), for example, thereby finding a special effort to evaluate emotional symptoms warranted in that category of cases—perhaps from a desire to make the physically injured victim whole or because the parties are likely to be in court in any event. [*Id.*].

Here, for the reasons we have stated, the Petitioner's and the Government's attack on the common-law category *permitting* recovery can fare no better than the *Metro-North* plaintiff's attack on the category *denying* recovery.

stances—none of which is present here—such as when tortfeasors acted in concert or with unity of purpose," *id.* at 35-36; and *second*, "[f]or a period during the middle of the [twentieth] century, joint and several liability was given somewhat broader rein," but "that move toward joint and several liability has since been abandoned as inequitable," *id.* at 39-40, so that "in a clear majority of States, even damages termed indivisible are now apportioned based on notions of comparative responsibility," *id.* at 40. None of these points withstands scrutiny.

A. The joint and several liability rule has deep historical roots in the English precedents and in the American law derived from the English common law. By the time FELA was enacted in 1908, a plaintiff could recover for all his damages from any one of the multiple tortfeasors whose negligence had inflicted a single indivisible injury (such as a physical injury) on the plaintiff.[8]

1. The English common law has recognized the joint and several liability of multiple tortfeasors since the eighteenth century. *Hill v. Goodchild*, 98 Eng. Rep. 465 (K.B. 1771)—in which Lord Mansfield ruled that two tortfeasors who were sued jointly were each fully liable to the plaintiff and that it was improper to apportion the damages liability between the

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[8] "Single, indivisible injuries" are those that by their nature are incapable of practical division, such as death or any single wound. W. Page Keeton, *Prosser and Keeton on Torts* § 52 at 347 (1984); *see also Rest. 2d of Torts* § 433A, cmt. i (1965) ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division . . . . By far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible.").

It is clear that the respondent employees' asbestosis is a single, indivisible injury. *See Urie v. Thompson*, *supra*, 337 U.S. at 169-71 (silicosis a single injury). The Petitioner's suggestion that asbestosis injury is divisible according to exposure, *see* Pet. Br. at 49, is thus wrong both as a matter of tort common law and as a matter of FELA precedent.

two—is a commonly cited precedent. *See* William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 414 (1937) (describing English antecedents to joint and several liability). As Dean Prosser explains, the rule was derived from the "unitary" cause of action that the strict rules on joinder of parties imposed, and allowed the plaintiff (who would not later be allowed to maintain a second action) to recover all his damages from any single tortfeasor who, acting in concert with others, caused plaintiff's injury. *Id.*; A.C. Freeman, II *A Treatise of the Law of Judgments* § 573 at 1212 (5th ed. 1925).

Once that much was established, over the next half century, in a somewhat uneven fashion, the rule was extended to tortfeasors who acted independently of each other but caused the plaintiff a single, indivisible, injury. Thus, in the much cited case of *Illidge v. Goodwin*, 172 Eng. Rep. 934 (K.B. 1831), a defendant—who negligently left a horse and cart unguarded in the street with the result that a passing stranger whipped the horse, who bolted and broke the plaintiff's window—was held liable for the entire damage. As the court held, "[i]f a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." *Id.* at 935.

2. Against this English common law background, the established American rule of multiple tortfeasor liability was described in the following terms in an 1880 treatise:

> If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages of either or both . . . . This rule obtains, although it is impossible to determine in what proportion each of the wrong-doers contributed to the injury; although the act alone of the party sued might have caused the entire injury; and although, if his act had not concurred in producing the wrong, the same damages would have resulted from the act of the other. [II Seymour D. Thompson, *The Law of Negligence* § 5 at 1088 (1880) (footnotes omitted)].

And, in his 1906 treatise Judge Cooley added:

> The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability. The weight of authority will, we think, support the more general proposition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert action." [I Thomas M. Cooley, *Law of Torts* § 166 at 247 (3d ed. 1906) (footnotes omitted).]

Five years later, the *Cyclopedia of Law and Procedure* summarized the American common law rule as being that "[w]here, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." 38 *Cyclopedia of Law and Procedure* at 488 (William Mack, ed. 1911).[9]

The Restatement of the Law of Torts ("*Rest. 1st of Torts*") confirms the foregoing. The goal of the Restatement was "to

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[9] The Petitioner cites to Cooley on Torts and to the Cyclopedia of Law and Procedure, *see* Pet. Br. at 35, n.27, but the cites ignore the sections of those treatises on point (and quoted above) in favor of sections addressed to other matters. Thus, the Petitioner's citation is to a section of Judge Cooley's treatise dealing specifically with nuisances and similar interferences with plaintiffs' property rights as cases outside the purview of the joint and several liability rule. *See* Thomas M. Cooley, *A Treatise on the Law of Torts* § 314 (Students' ed. 1907). *See infra* at 20 & n.10. And, the provision of the Cyclopedia the Petitioner cites, 38 *Cyclopedia of Law and Procedure* at 484, states only that several liability applies where the tortfeasors are responsible for "separate and distinct injuries," a proposition that is perfectly consistent with the joint and several liability rule which addresses single, indivisible injuries.

present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years." *Rest. 1st of Torts* at viii-ix (1939).

On the question of liability of "contributing tortfeasors," § 879 of the First Restatement states: "Except as stated in § 881, each of two persons who is independently guilty of tortious conduct which is a substantial factor causing a harm to another is liable for the entire harm, in the absence of a superceding cause."[10] The comment to § 879 makes clear that each tortfeasor is liable for all damages flowing from the harm regardless of whether the tortfeasors are simultaneously negligent or "where the act of one either occurs or takes harmful effect after that of the other." *Id.* §879, cmt. a.

The traditional common law rule stated in the above treatises and in the First Restatement is supported by numerous case authorities. Because the treatises are well annotated, and provide authorities from many American jurisdictions, *see Cooley on Torts, supra*, at 247-49 & nn.7-10, 12-17; *Cyclopedia of Law and Procedure, supra*, at

[10] Sections 879 and 881 of the First Restatement recognize that in the nineteenth century and through the early part of the twentieth century the common law viewed nuisance torts differently from torts that cause a single indivisible physical injury to the person. Thus, § 879 refers to § 881, which in turn provides that where "two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

488-89 & nn. 14-21, we provide only three of the more fully reasoned decisions as exemplars in the margin.[11]

3. In *The Steamship Juniata*, 93 U.S. 337 (1876), this Court established as the rule of admiralty that a libelant is entitled to recover all his damages for a single indivisible injury from one of two negligent marine tortfeasors, regardless of whether both or only one was sued, and

[11] *Boston and Albany Railroad Co. v. Shanly*, 107 Mass. 568 (1871), involved a suit by a railroad against two explosives manufacturers who independently and without knowledge of the other's activity, shipped explosives without properly packing their contents or warning the railway of dangers associated with shipping them together. One explosive ignited, causing a fire that caused the second explosive to explode. Together, they caused damage to the railroad. The Massachusetts court rejected the manufacturers' defense to joint and several liability, notwithstanding that each acted separately, not in concert, and in ignorance of the other's actions:

> The many ways in which wrongdoers may injure another give rise to some nice distinctions; but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. [107 Mass. at 579.]

See also Barrett v. Third Avenue R.Y., 45 N.Y. 628, 631 (1871) (collision of two carriages causing plaintiff personal injuries where both carriages jointly and severally liable: "If the acts of defendant's servants contributed to the injury, the defendant must respond in damages to the plaintiff, although the negligent acts of the persons in charge of the other car also contributed to the same result, and the comparative degree in the culpability of the two will not affect the liability of either. If both were negligent in a manner and to a degree contributing to the result, they are liable jointly and severally."); *Allison v. Hobbs*, 51 Atl. 245, 246 (Me. 1901) (if two persons "acting independently, by their several acts contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of the injury caused by each, they are then joint tort feasors, within the rule, and may be sued either jointly or severally, at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered").

regardless of whether the tortfeasors acted in concert or independently.

The Court did so by reversing a judgment apportioning damages between two marine tortfeasors—a steamer and a tug—both of whom were found to be negligent and independent contributors to libelant's loss: "We should adjudge that half the amount should be paid by the tug, and the other half by the steamer, but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offense being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages." *The Steamship Juniata*, 93 U.S. at 340. *See also The Atlas*, 93 U.S. 302, 315 (1876) (same).

Indeed, in *The Atlas*, the Court invoked the common law rule of joint and several liability, as we outlined it above, as a basis for its decision: "Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." *Id.* at 315.

This Court's decision in *The Steamship Juniata* and *The Atlas* carry particular weight here. As the Court noted in *The Atlas*, in contrast to the common law, admiralty did not treat a suitor's contributory negligence as a bar to his suit against, and his recovery from, negligent defendants. 93 U.S. at 316-17 ("[c]ontributory negligence on the part of the libelant cannot defeat a recovery in collision cases . . . . Proof of [this] kind will defeat a recovery at common law"); *see also The Max Morris*, 137 U.S. 1 (1890) (applying comparative negligence in admiralty case to permit suit for personal injuries suffered by negligent plaintiff). The Court, mindful of that distinction between the common law and admiralty, nonetheless determined that the traditional common law joint and several liability rule as the Court stated it should be the

admiralty rule. *The Atlas*, 93 U.S. at 316-17. And, in enacting FELA, which removed the contributory negligence bar of the common law, Congress looked specifically to admiralty as a model. *See* 42 Cong. Rec. 4536 (April 6, 1908).

4. Against the foregoing, the Petitioner musters a string cite to three cases that hew to the original eighteenth century English rule that joint and several liability applies only where the multiple tortfeasors act in concert to bring about a single indivisible harm and not where the tortfeasors act independently.[12]

Since the authorities we have reviewed state that the general joint and several liability rule has been the dominant American common law rule, the Petitioner's showing that there was also a narrower minority rule avails it nothing. But at least the three cited cases go to the pertinent point: did the traditional common law provide for joint and several liability or for several liability, where multiple negligent tort-feasors inflict a single, indivisible injury on the plaintiff, such as a physical injury to the person. That cannot be said of the Petitioner's other authorities all of which treat with situations that, by definition, are outside the scope of the common law joint and several liability rule. Since that rule did not purport to govern all multiple tortfeasor cases, the Petitioner's documentation that there were, in addition to the cases governed by the joint and several liability rule, other qualitatively different cases that were governed by a several liability rule, is an exercise in obfuscation.

a. The Petitioner, for example, seeks to make its case by citing cases involving nuisances and tortious damage to crops and livestock that the common law of the time treated as a category of cases outside the scope of the joint and

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[12] At Pet. Br. at 35, n.28, the Petitioner cites to *Schneider v. City Council of Augusta*, 45 S.E. 459 (Ga. 1903); *Weist v. City of Philadelphia*, 49 Atl. 891 (Penn. 1901); *Cole v. Lippitt*, 46 Atl. 43 (R.I. 1900).

several liability rule.[13] *See* Cooley, *supra*, at § 314; *Rest. 1st of Torts* § 881.

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[13] At Pet. Br. n.28, the Petitioner string cites to *Ralston v. United Verde Copper Co.*, 37 F.2d 180 (D. Ariz. 1929) (air pollution); *King v. Ruth*, 101 So. 500 (Miss. 1924) (crop damage); *Mitchell Realty Co. v. West Allis*, 199 N.W. 390 (Wisc. 1924) (stream pollution); *Farley v. Crystal Coal & Coke Co.*, 102 S.E. 265 (W. Va. 1920) (stream pollution); *Jones v. Tennessee Coal, Iron, & R. Co.*, 80 So. 463 (Ala. 1918) (stream pollution); *Boulger v. Northern Pac. Ry.*, 171 N.W. 632 (N.D. 1918) (flooding); *McLeod v. Miller & Lux*, 167 P. 27 (Nev. 1917) (flooding); *Polk v. Illinois Cent. R. Co.*, 195 S.W. 129 (Ky. 1917) (flooding); *Sherwood v. St. Louis Ry. Co.*, 187 S.W. 260 (Mo. 1916) (flooding); *Woodland v. Portneuf Marsh Valley Irr. Co.*, 146 P. 1106 (Idaho 1915) (flooding); *Johnson v. Irvine Lumber Co.*, 140 P. 577 (Wash. 1914) (flooding); *Man v. Stoner*, 87 P. 434, 440 (Wyo. 1906) (diversion of water from ditch); *Standard Phosphate Co. v. Lunn*, 63 So. 429 (Fla. 1913) (stream pollution); *Brown v. Chicago, B. & Q. R. Co.*, 195 F. 1007 (D. Neb. 1912) (flooding); *Sherman Gas & Electric Co. v. Belden*, 123 S.W. 119 (Tex. 1909) (noise and fumes from power plant); *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.*, 66 S.E. 73 (Va. 1909) (land and stream pollution); *Wood v. Snider*, 79 N.E. 858 (N.Y. 1907) (land damage from trespassing animals); *Mansfield v. Brister*, 81 N.E. 631 (Ohio 1907) (pollution of stream); *Watson v. Colusa-Parrot Mining & Smelting Co.*, 79 P. 14 (Mont. 1905) (land pollution); *Anderson v. Halverson*, 101 N.W. 781 (Iowa 1904) (sheep killed by dogs); *Pacific Live Stock Co. v. Murray*, 76 P. 1079 (Ore. 1904) (land damage by animals); *Swain v. Tennessee Copper Co.*, 78 S.W. 93 (Tenn. 1903) (air pollution); *State v. Wood*, 35 A. 654 (N.J. 1896) (crop damage by animals); *Ames v. Dorset Marble Co.*, 23 A. 857 (Vt. 1892) (flooding); *Miller v. Highland Ditch Co.*, 25 P. 550 (Cal. 1891) (flooding); *Middlesex Co. v. Lowell*, 21 N.E. 872 (Mass. 1889) (pond pollution); *Sloggy v. Dilworth*, 36 N.W. 451 (Minn. 1888) (flooding); *Chicago & A.R. Co. v. Glinney*, 9 N.E. 203 (Ill. 1886) (flooding); *Long v. Swindell*, 77 N.C. 176 (1877) (drainage of easement); *Powers v. Kindt*, 13 Kan. 74 (1874) (crop damage by animals).

At Pet. Br. pp.37-38 & nn.30-32, the Petitioner cites as its authority for the proposition that the early American common law showed "a preference for apportionment" the nuisance and like cases that were then regarded as outside the scope of the joint and several liability rule. *Slater v. Pac. Am. Oil Co.*, 300 P. 31 (Cal. 1931) (land pollution); *Harley v. Merrill Brick Co.*, 48 N.W. 1000 (Iowa 1891) (air pollution); *Coleman*

b. The Petitioner also cites to four cases concerning the liability of multiple tortfeasors who have inflicted *multiple separate injuries* on the plaintiff that again constitute a category of cases outside the joint and several liability rule.[14]

c. The Petitioner cites to portions of Judge Cooley's torts treatise and to the Cyclopedia of Law and Procedure which, as noted above, are not addressed to any aspect of the joint and several liability rule at all, but instead to matters outside the scope of that rule. *See* fn. 9, *supra*. In the same vein, the Petitioner cites an ALR annotation, for the proposition that "acts of independent tortfeasors, each of which causes some damage, may not be combined to create a joint liability at law

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Vitrified Brick Co. v. Smith, 175 S.W. 860 (Tex. Civ. App. 1915) (brick plant adjoining homestead); *Mexican Nat'l Constr. Co. v. Middlegge*, 13 S.W. 257 (Tex. 1890) (flooding caused by excavation); *South Iron & Steel Co. v. Acton*, 62 So. 402 (Ala. Ct. App. 1913) (land and river pollution); *Ogden v. Lucas*, 48 Ill. 492 (1868) (crop damage by animals); *Eckman v. Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427 (1911) (stream pollution); *Hill v. Chappel Bros.*, 18 P.2d 1106 (Mont. 1932) (land damage by animals); *Wm. Tackaberry Co. v. Sioux City Serv. Co.*, 132 N.W. 945 (Iowa 1911) (flooding of stream); *Bowman v. Humphrey*, 109 N.W. 714 (Iowa 1906) (stream pollution); *Chipman v. Palmer*, 77 N.Y. 51 (1879) (stream pollution); *Cal. Orange Co. v. Riverside Portland Cement Co.*, 195 P. 694 (Cal. Ct. App. 1920) (air pollution); *Thomas v. Ohio Coal Co.*, 199 Ill. App. 50 (1916) (stream pollution); *Symmes v. Prairie Pebble Phosphate Co.*, 63 So. 1 (Fla. 1911) (pollution to oyster beds).

[14] *Livesay v. First Nat. Bank of Denver*, 86 P. 102 (Colo. 1906) (separate conversions of separate pieces of property); *Le Laurin v. Murray*, 87 S.W. 131 (Ark. 1905) (two separate assaults causing two separate injuries); *Albrecht v. St. Hedwig's Roman Catholic Ben. Ass'n*, 171 N.W. 461 (Mich. 1919) (two distinct intentional assaults (one, an assault on plaintiff in a social club, two, the throwing of the plaintiff out of the social club) that appear to have caused two injuries, although the court did recognize that the plaintiff who was injured would have difficulty assigning the separate damages from each assault); *Gulf C & S & SF Ry. Co. v. Cities Service Co.*, 273 F. 946, 951 (D. Del. 1921) (separate tortious interferences with contract, each creating a separate breach of the contract).

for damages." Pet. Br. at 35. But at the outset, the annotation itself recognizes the general rule of joint and several liability by stating that "probably most authorities agree that if but a single injury is the result of the independent action of various tortfeasors, all may be joined in an action for damages therefor," Annotation, 9 A.L.R. 939, 939 (1920), and only then goes on to describe cases involving multiple tortfeasors, each of whom has "caused some damage," to demonstrate the points that "it is not always possible to say whether the injury is single or separate," *id.*, and that where there are multiple separate injuries the liability of the various tortfeasors is several, not joint and several, *id.*

d. The Petitioner goes even further afield in citing to a number of cases where the issue was whether, and if so how, to segregate the injury to the plaintiff caused by a *single* tortfeasor from harms attributable to other causes, cases that have no relevance to the joint and several liability rule which governs multiple tortfeasor situations.[15]

e. Lastly, the Petitioner discusses at some length *McGannon v. Chicago & N.W. Railway Co.*, 199 N.W. 894 (Minn. 1924) which is said to be "on all fours" with the case before the Court. Pet. Br. at 37. There, the Minnesota court held improper the joinder of two employers, both who harmed plaintiff who inhaled sand dust in their employ. That

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[15] *Boesch v. Graff*, 133 U.S. 697, 706 (1890) (recovery against single tortfeasor separated from harm caused by market forces); *Standley v. Atchison, Topeka & Sante Fe Railway*, 97 S.W. 244, 246-47 (Mo. Ct. App. 1906) (flooding caused by single tortfeasor aggravated by naturally occurring overflow of stream); *Radburn v. Fir Tree Lumber Co.*, 145 P. 632, 644 (Wash. 1915) (same); *Jenkins v. Pennsylvania Railroad*, 51 A. 704, 706 (N.J. 1902) (air pollution caused by single tortfeasor limited to amount above that caused by safe and careful operation). Two of the Petitioner's other cited cases also involve a single tortfeasor. *Louisville, New Albany and Chicago RY v. Jones*, 9 N.E. 476 (1886) (aggravation of existing disease); *Bebout v. Pense*, 14 N.W. 515 (S.D. 1913) (allegation that one of two defendants uttered a slander).

court did so, however, on the grounds that plaintiff had alleged a "separate tort" against each of the employers, and in rendering its holding the court distinguished cases in which two tortfeasors caused "but one injury," recognizing that in those cases joinder was proper. *Id.* at 894. *McGannon*, far from establishing a common law rule of several liability for multiple tortfeasors causing an indivisible injury, is merely an exemplar of the cases providing for apportionment of liability for multiple, divisible injuries. Where the Minnesota court in *McGannon* goes astray is exactly where the Petitioner claims that it is "on all fours with the case at bar": *viz.*, its treatment of silicosis as a divisible set of injuries, a treatment of the injury flatly rejected by this Court in *Urie v. Thompson, supra. See also Joint Torts and Several Liability, supra*, at 443, n.182.

Simply stated, none of the Petitioner's authorities is remotely relevant.

B. As the Petitioner somewhat grudgingly admits, during the middle of the twentieth century—the period from the First Restatement to the Second Restatement—joint and several liability was not simply the widely accepted traditional common law rule of liability where multiple tortfeasors caused the plaintiff an indivisible injury—it was the American rule. *See* Pet. Br. at 39 ("[f]or a period during the middle of the last century, joint and several liability was given somewhat broader rein"); *Rest. 2d of Torts* § 875 ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."). *See also id.* §§ 876, 879 (providing specific applications of the rule), § 433A & cmt. i (explaining that normally personal injuries are indivisible but that nuisance injuries can be divisible).

But, says the Petitioner, just as the evolving common law replaced the earlier well-settled traditional rule against

wrongful death actions by a rule authorizing such actions with a consequent effect on the law of admiralty, *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), so has the evolution of the law since publication of the Second Restatement replaced the traditional joint and several liability rule with a several liability rule, and that change in the common law should be given effect in FELA. *See* Pet. Br. at 39-43; *see also* Br. of Amici Coalition for Asbestos Justice at 21-23. But in contrast to *Moragne*, in this instance there has been no sea change in the common law.

The last 30 years have seen a wide-ranging review—principally by State legislatures—of the multiple tortfeasor liability rules. The outcome has not been anything like a general move to replace the joint and several liability rule with the several liability rule the Petitioner advocates. Rather, the salient points regarding the current State laws, as compiled in the *Restatement (Third) of Torts: Apportionment of Liability* (2000) (hereafter "*Rest. 3d of Torts*") are these:

- Twenty jurisdictions maintain the joint and several liability rule as it existed at common law. Thirteen jurisdictions provide for joint and several liability in all cases.[16] Seven more provide for joint and several liability in all the cases that have traditionally been actionable at common law, by providing that a non-negligent plaintiff may recover all the damages for his indivisible injury jointly and severally from any of the multiple tortfeasors.[17]

[16] *See Rest. 3d of Torts* §17 at 151-52: (Alabama, Arkansas, Delaware, District of Columbia, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia all have retained pure joint and several liability with respect to each contributing tortfeasor).

[17] Georgia, Oklahoma, and Washington have expressly maintained the joint and several liability rule for suits by non-negligent plaintiffs. *Rest. 3d of Torts* at 153. In Minnesota, Missouri, Montana, New Hampshire,

- By contrast, fewer States have adopted the strict rule of apportioning indivisible injuries by comparative fault that Petitioner advocates this Court should adopt as the rule for FELA claims. *See* Pet. Br. at 50. Upon inspection, the *Rest. 3d of Torts* lists only ten States that apply pure several liability in all cases. *Id.* at 154-55. All but one, Tennessee, have provided for several liability by legislative enactment. *Id.*[18]

In *Moragne*, the Court observed that over the course of many decades legislatures had shown a "unanimous disapproval of the rule against recovery for wrongful death," 398 U.S. at 389, such that at the time of its decision, every State had enacted a wrongful death statute, *id.* at 390. Against that showing, the Court concluded that "the work of legislatures has made the allowance of recovery for wrongful death the general rule of American law," and that the rule should therefore be incorporated into the law of admiralty. *Id.* at 393.

It simply cannot be said that state legislative enactments have made apportionment of multiple tortfeasor liability on the basis of several liability "the general rule of American law." To the contrary, although many legislatures have modified the traditional common law rule of joint and several liability, many have not. And even with respect to those jurisdictions that have, the resulting "farrago of arrangements" do not represent a clear and uniform response of the

and Oregon, multiple tortfeasors are jointly and severally liable for all damages caused by indivisible injuries, but if a defendant can prove that contribution from other defendants is uncollectable, the court reallocates the uncollectable share in proportion to comparative responsibility. *Id. at* §§C18, C21(a), *& p.156*. Thus, in these States a non-negligent plaintiff proceeds in court under the common law joint and several liability rule.

[18] The remaining 21 States have adopted one or more of a variety of hybrid joint and several/several liability regimes, many of which are quite complex. *See Rest. 3d of Torts* § 17.

kind the Court in *Moragne* found persuasive. See *Rest. 3d of Torts* §10, cmt. a.

b. The federal common law, as it has been applied by this Court and by lower federal courts, cuts deeply against the Petitioner's thesis that the common law rule of joint and several liability has been abandoned as inequitable in favor of a several liability rule. In addition to admiralty, *see supra* at 22, federal courts apply joint and several liability under the Jones Act, 46 U.S.C § 688, a statute modeled on FELA to protect seamen from their employer's negligence, *see Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), under common maritime law, *see Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. en banc) (Higginbotham, J.), and under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, *see Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263, 271 (1979).[19] Indeed, *Edmonds* expressly rejected an entreaty to abandon joint and several liability in favor of proportional fault apportionment, 443 U.S. at 271, as did the Fifth Circuit in *Coats*, 61 F.3d at 1130-32.

CONCLUSION

For the above-stated reasons, and those stated by the Respondents, the decision below should be affirmed.

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[19] In addition to demonstrating the continuing vitality of traditional joint and several liability as a federal common law rule, the foregoing authorities also refute the suggestion, made both by the Petitioner and its amici, *viz.*, that joint and several liability is incompatible with notions of comparative negligence that allow a plaintiff to recover damages even if he also was negligent, because under this regime each wrongdoer should only be liable for its portion of fault. *See* Pet. Br. at 43.

Respectfully submitted,

JONATHAN P. HIATT
815 Sixteenth Street, N.W.
Washington, D.C. 20006

ROBERT ALEXANDER
LEON DAYAN
LAURENCE GOLD *
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600

* Counsel of Record